IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944.

No. 1281

GRACE B. MARTIN AND CELIA KING,
Petitioners,

vs.

MARIAN SCHILLO, ADELE SCHILLO AND DOROTHY S. FISCHER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

MEMORANDUM FOR PETITIONERS IN REPLY TO BRIEF IN OPPOSITION.

EDWARD H. S. MARTIN,
Counsel for Petitioners.

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1. In its contention that the decision sought to be reviewed involves only a construction of a state statute and therefore is not subject to review, the brief in opposition overlooks the fact that the State Supreme Court purported to base its decision solely on the first two sections

of the Illinois Attachment Act and did not construe nor pass upon the validity of several other statutes mentioned in our petition for certiorari and supporting brief, namely, § 28 of that Attachment Act, making defects in the attachment affidavit amendable and therefore not jurisdictional, § 27 of that Act, making an attachment affidavit a pleading, § 43 (2) of the Illinois Civil Practice Act, authorizing pleading in the alternative, and Rule 2 of the Illinois Supreme Court, making that Practice Act apply in attachment suits to the extent that procedure therein is not regulated by the Attachment Act; and thereby the Illinois Supreme Court sought to evade the federal constitutional question involved in the case by purporting to base its decision on an obviously inadequate and untenable legal ground; all of which was set forth in our petition and supporting brief, and cases cited showing that the state court could not in that manner deprive the United States Supreme Court of its right to pass upon the federal constitutional question.

2. While we do not consider discussion as to the merits called for at this time, we do want to reply briefly to respondents' argument that the Illinois Supreme Court decision is correct and to refer briefly to a few of the cases cited in respondents' brief, some of them on the jurisdictional question and some of them on the merits. In our said supporting brief (p. 8) we have sufficiently distinguished *Rabbitt* v. *Weber,* 297 Ill. 491, cited by respondents (Br. 8, 10, 12) and *Morris* v. *Hogle,* 37 Ill. 150, (Resp. Br. 8). In our supporting brief (p. 30), we have also sufficiently distinguished *Thormyer* v. *Sisson,* 83 Ill. 188, (Resp. Br. 10).

The United States Supreme Court decisions cited in respondents' brief (pp. 9-10), in an attempt to show that the instant case involves only construction of a state stat-

ute and presents nothing for review on certiorari, do not have that effect at all. They are all cases where it was sought to review state statutes on the theory of their repugnancy to the federal constitution, whereas the state court had not been called upon to determine the validity of the statutes nor that question of repugnancy, but had based its decision merely on the construction of statutes which were unquestionably valid.

Brewer & H. B. Co. v. *Boddie,* 59 Ill. App. 45, cited in respondents' brief (p. 12) has nothing whatever to do with the proposition on which it is there cited. It merely holds that where two separate pleas were attempted to be verified by an affidavit alleging that the *foregoing plea* is true, the affidavit verified neither plea because it could not be told which plea it referred to and therefore no perjury had been committed.

Hutson v. *Wood,* 263 Ill. 376, cited in respondents' brief (p. 12) is not in point either on the proposition on which it is cited. It was a case involving an execution sale on a judgment by confession entered by the clerk *in vacation,* which was absolutely void because there was no affidavit of execution of the warrant of attorney and the judgment was entered for more than confessed, and besides, there was no court finding and the judgment was not a judicial act, but merely a ministerial act of the clerk.

We submit that the petition for certiorari ought to be granted.

Respectfully submitted,

EDWARD H. S. MARTIN,
Attorney for Petitioners.